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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,

Petitioner,

- against -

DENISE FINN MCVEIGH, as Administratrix
of the Estate of Joseph E. McVeigh,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

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REPLY TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

This supplemental memorandum is respectfully submitted, pursuant to Rule 15.8 of this Court, to address an "intervening matter not available at the time of (our) last filing", namely the facts, positions and arguments of the United States relative to this petition for certiorari submitted by Empire Healthchoice Assurance, Inc. (Empire).

1. THE UNITED STATES BRINGS TO THE ATTENTION OF THIS COURT A CHANGE IN THE LAW THAT PROVIDES FURTHER EVIDENCE OF CONGRESSIONAL INTENT

As this Court is well aware, the FEHBA statute expressly provides for jurisdiction in the federal courts in cases "against the United States" (while not expressly providing for federal court jurisdiction in actions such as *McVeigh* [where the carrier brings suit against an enrollee]).

The United States now brings to the attention of this Court a fact not previously discussed, namely that OPM amended its regulations in 1995 to provide for suit by an enrollee against the OPM, rather than against the insurance carrier, thus making the action, in effect, "against the United States" and thereby invoking federal-question jurisdiction under that express jurisdictional statement in the FEHBA. (Amicus Curiae Br. 13-14 and footnote 7).

The United States further sets forth the fact that neither the OPM, nor Congress, has seen fit in the ten years since that amendment to take any action to expressly provide for jurisdiction when a carrier brings an action against an enrollee.

"There has been no change in the law, however, that would affect federal jurisdiction in FEHBA reimbursement cases, such as the instant case and *Ochs*." (Amicus Curiae Br. 14.)

What the United States has done in its Amicus Curiae Brief, perhaps inadvertently, is to provide further evidence that neither the Congress, nor OPM, intended for there to be federal court jurisdiction in actions by insurance carriers against enrollees, the exact position taken by *McVeigh*.

Both the United States and Empire are seeking for the Circuit Courts (and now this Court) to, in effect, legislate jurisdiction in the federal courts over actions by insurance carriers against enrollees, an action clearly not intended by the Congress.

It is submitted that this Petition should be denied.

2. THE UNITED STATES HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

In a glaring omission, the United States, in support of Empire's Petition, fails to present any evidence to articulate a compelling reason for this Court's discretionary review. While the United States provides general information concerning how the FEHBA program is funded, there are no specific facts or figures provided to in any way reflect or suggest how adjudication of reimbursement claims in state court, would, in any manner, effect the U.S. Treasury, or would, in any manner, effect the uniformity of the FEHBA program.

Instead, the United States makes the conclusory and unsupported claim that the *McVeigh* and *Cruz* decisions will somehow "threaten(s) the achievement" of national uniformity. (Amicus Curiae Br. 10-11).

However, the United States fails, as does Empire in it's petition, to offer anything beyond mere speculation to support such a claim. There is simply nothing in this record to support the argument that these circuit court decisions will "threaten" uniformity. Nor is there anything in this record to suggest that the state courts cannot uniformly adjudicate these simple contract claims and apply federal law in the process, if necessary.

There is nothing in this simple contract claim, beyond sheer speculation, to show any compelling reason for this Court's discretionary review of this case.

3. THE UNITED STATES HAS NOT SHOWN A REAL CONFLICT BETWEEN THE CIRCUITS, ONLY DIFFERING RESULTS BASED UPON DIFFERENT FACTS

The United States argues, as does Empire, that "the Second and Seventh Circuits reached diametrically opposed conclusions" in the *McVeigh* and *Cruz* decisions, respectively (Amicus Curiae Br. 10), and that "These two cases arise from remarkably similar facts" (Amicus Curiae Br. 11).

These arguments, however, are simply untrue. While both the *McVeigh* and *Cruz* cases involve similar fact patterns, there is one striking factual distinction between them that was

dispositive of both cases in the lower courts. Indeed, the United States itself sets forth the factual differences between the *Cruz* and *McVeigh* cases.

The United States describes a specific conflict between state and federal law in the *Cruz* case [namely the applicability of "the state 'common fund' doctrine, which Cruz asserted would have required Blue Cross to shoulder some of the attorney's fees" (Amicus Curiae Br. 8-9)]. At the same time, the United States, in the same way that Empire does, fails to identify any such conflict in the *McVeigh* case.

These two cases are not identical and were, in fact, decided on different facts, specific to each case.

What is clear from the Circuit decisions in the *Cruz* and *McVeigh* cases is that if the insurance carrier provides proof of an actual conflict between federal and state law (as it did in *Cruz*), the court will find federal question jurisdiction under the *Boyle* test, as enunciated by this Court. Conversely, if the insurance carrier fails to present any proof of any such conflict (as Empire failed to do in *McVeigh*), then the second prong of the *Boyle* test is not met.

Contrary to the position taken by the United States in its Amicus Curiae Brief and contrary to the position taken by Empire, there is no real conflict between the Circuit decisions, only differing results based upon different facts.

As such, there is no compelling reason for discretionary review of these cases by this Court.

CONCLUSION

It is submitted that neither the United States, nor Empire, has presented any evidence or facts to demonstrate any compelling reason for this Court to grant certiorari. Despite the fact that such proof (such as concrete evidence of how state court adjudication of these claims would effect the U.S. Treasury, or effect the uniform administration of the FEHBA program) is clearly in their purview, nothing is presented to justify review by this Court, beyond speculation and conjecture.

Furthermore, neither the United States, nor Empire, shows any substantial conflict among Circuits as to whether or not federal court jurisdiction exists over these types of claims. Both Circuits followed the rule of this Court set forth in Boyle and found jurisdiction when the proof showed an actual conflict between state and federal law.

Respectfully, the Petition should be denied.

Respectfully submitted,

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